Supreme Court, U.S.
FILED

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No. 99-

In the

SUPREME COURT of the UNITED STATES

SHANNON ROGAN,
Petitioner

V

PAUL V. EVANS,
Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the First Circuit

PETITION FOR WRIT OF CERTIORARI

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October 12, 1999

47 pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether a policy and procedure of the Boston Police Department (BPD) deprived Petitioner of a fundamental right in violation of Section 1983 of 42 U.S.C. and the 14th Amendment of the U. S. Constitution.

2) Whether Chapter 517 of the Acts of 1981, that amended Chapters 664 of the Acts of 1968, and Chapter 90, M.G.L. was enacted in violation of the due process and equal protection clauses of the 14th Amendment of the U.S. Constitution.

3) Whether allegations against Defendant Commissioner Paul F Evans qualified, as "a short and plain statement of claim" as required by Rule 8 (a)(2) FRCP, justifying inquiry as to the Commissioner's 'individual' responsibility.

LIST OF PARTIES

Shannon Rogan, (Rogan) residing at 34 Oak Street in Reading, Mass. County of Middlesex, filed suit in the federal district court of Mass. alleging deprivation of her right to an impartial examination of the facts surrounding the collision of her motor vehicle on March 15, 1996 with a trolley operated by the Massachusetts Bay Transportation Authority, (MBTA, The 'T')

Paul F. Evans (Evans) a resident of South Boston is Police Commissioner of the City of Boston (Boston) and has his offices at 1 Schroeder Plaza, Boston, Ma. 02120-2014. He concedes responsibility for the policy providing for the automatic transfer to the T patrol force of jurisdiction over accidents involving T vehicles on the public ways.

PARTIES IN THE DISTRICT COURT

Hon. Thos. Menino, Boston Mayor, and Dennis DiMarzio, Chief Operations Officer were named as Defendants along with the following police personnel: Evans, Sergeant John McDonough, and Robert Colburn, patrolman. At a hearing on May 8, 1997, on a motion to dismiss under Rule 12(b)(6), FRCP; (A) Menino was dismissed as a defendant, B) Evans was found officially responsible making Boston a Defendant, and, (C) Evans and DiMarzio were dismissed in their 'individual' capacities. Also named as Defendants, but **dismissed by stipulation**, were the MBTA and several of its employees

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In The
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No. 99-

SHANNON ROGAN,

Petitioner

V

PAUL V. EVANS

Respondent

Petition for Writ of Certiorari to the

United States Court of

PETITION FOR WRIT OF CERTIORARI

Petitioner Shannon Rogan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-) is reported at 175 F 3rd. 75 (1st Cir. 1999). The dismissal of DiMarzio, Evans, McDonough and Colburn at a pre-trial conference by *sua sponte* 'summary judgment' (App. C, p.,unpublished) was vacated for procedural error and the case remanded. The court affirmed the dismissal of Evans in his 'individual' capacity. Motion for reconsideration was timely filed on the 'individual capacity' issue and denied on July 27, 1999 (App. F)

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

This Petition, under 28 U.S.C. Section 1254 (1), seeks a review in part, of the opinion of the three judge Court of Appeals (Selya, B., Circuit Judge) on Rogan's Appeal from rulings and judgments of the district court (Hon. William G. Young) Petitioner challenges the affirmation of the dismissal of Defendant Paul F. Evans in his 'individual' capacity. The case involves municipal police forces and those of Urban Transportation Authorities and has national ramifications. This Petition was timely filed within 90 days of the panel reconsideration.

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND ORDINANCES INVOLVED IN THIS CASE.

1. Section 1 of the Fourteenth Amendment adopted in 1868, provides:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"

2. 42 U.S.C. Sec. 1983, the' Ku Klux Klan' Act of 1871, reading: "any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject or cause to be subjected, any person to the deprivation of any rights"

3. Section 29 of Chapter 90 M.G.L.

4. Chapter 664 of the Acts of 1968, (Mass)

5. Chapter 90C Mass. G.L.

6. Chapter 517 of the Acts of 1981 (Mass

7. CBC Ord. Chap. 16 Sec 16.1 (App. I)

STATEMENT OF THE CASE

While passing over a public way in Boston connecting the inbound and outbound roadways of Commonwealth Avenue across the street car reservation, Petitioner's motor vehicle was struck by a T 'Green Line' trolley. Rogan, a pre-med. student at Boston College, a pianist, violinist and officer in the college symphony orchestra, was seriously injured and her left arm permanently paralyzed. Boston Police officers McDonough and Colburn, of District Fourteen in Brighton, responded to the scene, and interrogated the operator of the trolley. Their investigation was aborted upon the arrival of MBTA patrol officers, for, according to their official report, (R. p 302) "*the **incident** was under the jurisdiction of the MBTA*" and "*investigation will be the responsibility of that department*". An MBTA patrol officer cited Rogan under Chapter 90C, Mass. G.L. for 'fail to yield' to a sign "Yield to trolley" and fined her fifty dollars. (Record Page-300) Rogan had in fact yielded in obedience to the sign prior to entering the crossover. (R.: P-259). The citation caused Petitioner a great deal of distress, pain and suffering and allegedly seriously diminished the value of her cause of action for negligence.

The Complaint alleged that the citation was issued in accordance with an MBTA scheme to leverage accident claims by interposing "failure to yield" as a factor of comparative negligence. Rogan asserts that the assignment policy of the Boston police department was vital to the MBTA plan. **Patrol officers would never have been in a position to falsely cite her for 'fail to yield', had the Boston Police continued their investigation, as was their duty under Chapter 90 Sec 29, Mass. G.L.**

At a hearing in the district court on July 26, 1999 the remanded litigation was consolidated with two related cases, all to be docketed as No: 97-10417-WGY. Judge William G. Young (now Chief Judge of the District Court) will again consider the police procedure. This time the Attorney General of Massachusetts has been made a party. Whether consideration of this Petition ought to be deferred pending ruling by the district court is a matter for this court's discretion.

The Court of Appeals opinion does not even mention the very statute which is the foundation of the police procedures that resulted in Petitioner's deprivation. The court invented a theory of liability in no way justified by the allegations of the Complaint to avoid the implications of Monell v. Social Service Dept of N. Y., 436 U.S.658 (1978).

Policy is defined by The American Heritage Dictionary of the English Language, 2nd Ed 1969, Houghton-Mifflin Co as

"A course of action, guiding principle, or procedure considered to be expedient, prudent or advantageous:

A municipality is liable for a civil rights deprivation under Section 1983 of 42 U.S.C., if the offense is attributable to a "custom, usage or policy" duly authorized by municipal officials.

Monell v. Soc. Serv. Dept of N. Y., supra.

Focusing on the 'individual' responsibility of Commissioner Evans, the appellate court gave provisional sanction to the transfer policy when it wrote: *"The BPD's policy of ceding jurisdiction to the MBTA is undoubtedly constitutional on its face-after all, there is no constitutional prohibition against organizational schemes that lodge self-investigative powers within a government agency"* (Rogan v. Menino, 175 F3d 75 @ 78).

The court termed "*the BPD's policy*" as equivalent to an 'organizational scheme' which "on its face" was "undoubtedly constitutional". Were the policy viable, the Defendant Commissioner could be held blameless. It is submitted that viability might depend on BPD directives, if any, safeguarding accident victims from the risk of T bias.

Significantly the court's comment amounts to an acknowledgement that **policy** was understood by it as the basis for Rogan's cause of action. The court confessed likewise in two other instances as well, in different contexts. First, when it wrote: @ 175 F3d @76, "*Pursuant to departmental policy the BPD officers, John McDonough and Robert Colburn, relinquished control of the investigation to their MBTA counterparts*" and secondly, @ 175 F3d @ 77 that Evans' liability related to his role "*in promulgating and enforcing a policy of relinquishing jurisdiction over accidents involving MBTA carriers to MBTA police*"

The court conceded the existence of the policy, or "*organizational scheme*" implemented by Evans. It is a matter of record that the policy programmed the Brighton police officers to abort their investigation of Rogan's accident. The lower court found that as a result of that **policy**, Rogan was deprived of an "impartial investigation" of her accident. (R. p 129) The existence of the policy is the touchstone of Rogan's cause of action.

On the authority of Monell, Boston is liable for Rogan's deprivation. The absence of an impartial investigation of her accident was an impediment to her fair and adequate access to the judicial system and a violation of Section 1983 of 42 U.S.C. and of her due process rights under the Fourteenth Amendment. Chambers v. Baltimore & Ohio RR., 207 U.S., (1907)

After pronouncing that Rogan was entitled to "all reasonable inferences" incredibly the court ventured that the Complaint "suggested some form of supervisory liability". With 'supervisory liability ' as a major premise, the court set forth its minor proposition to wit, *"To state a cognizable claim on that basis, Rogan needed to depict a scenario that would permit a fact based inference that Evans was guilty of conduct that amounted to condonation of wrongdoing"* adding that *"to a significant extent such conduct depends on the presence or absence of notice"*
The court concluded its reasoning; by announcing that since Rogan had not alleged any facts that *"Evans knew (or had any basis for knowing) that MBTA police officers were skewing investigations to minimize MBTA liability"*, Q.E.D. (175 F3d @77), the *"instant complaint encompasses no set of facts that entitles Rogan to relief against Evans"*.

The court's sophism followed logically from its false opening premise. It knew and had acknowledged repeatedly that Petitioner's Complaint was based on the custom and policy at Station Fourteen in Brighton. Calling an apple an orange doesn't change the nature of the fruit. An "organizational scheme" is a procedure considered to be. "expedient, prudent or advantageous" The phrase "*some sort of supervisory liability*" conveys an ambiguity downplaying the concept of 'policy' and shifting the cause of action outside the contours of Section 1983 of 42 U.S.C. Justice Brennan drew the distinction between policy and *respondeat superior*" in Monell, 98 Sup. Ct. @ 2036.

> "*We begin with the language of Sec. 1983 as originally passed: any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject or cause to be subjected, any person to the deprivation of any rights" The italicized language plainly imposes liability on a government that, under color of some official policy, "causes" an employee to violate another's constitutional rights"*

Rogan alleges that it was the policy requiring the automatic transfer of jurisdiction that deprived her of an impartial investigation of her accident and delivered her into the hands of the MBTA patrol.

The Complaint alleged sufficient facts to justify an inference, (constructive notice), not only that T patrol officers were likely to skew investigations of incidents involving potentially serious damages to the T, but that irregular examinations were inevitable in motor car-trolley accidents. If Evans' policy was due to gross indifference to the motoring public and to Rogan, or to 'collogue' with the MBTA, he can not properly be dismissed in his 'individual capacity'

City of Canton v. Harris, 489 U.S.378, (1989)

Programming police activity by implementing a policy that sets a 'routine' amounts to "direct participation". Evans had 'fair notice' that the custom and policy at the Brighton police station was the gravamen of Rogan's Complaint. The allegations constituted a "short and plain statement of her claim" as required by Rule 8 (a)(2) FRCP

Conley v. Gibson, 355 U.S. 99, (1957).

On the pleadings Rogan ought to have been allowed to go forward to discover circumstances bearing on Evans' 'individual responsibility'.

Leatherman v. Tarrant County N. 10 & C Unit, 507 U.S. 163, 164 (1993)

The constitutionality of the policy must be evaluated by balancing the state's interest in efficient law enforcement procedures against an individual's right to a fair evaluation of the circumstances of one's accident

The Appeals Court commented that "on its face" the transfer policy is constitutional. The '*face*' of the policy is not the issue, neither is the face of Chapter 664 of the Acts of 1968, the issue. Rogan represented in her appeal brief that the amendment of Chapter 664 by Chapter 517 of the Acts of 1981, was the basis for the police procedure. Rogan's presentment was ignored and no mention of Chapter 517 is found in the Court of Appeals opinion. The court chose to evaluate the "face" of Chapter 664 without its amendments. The amendment is what caused the problem; it completely changed the nature of the T patrol.

Rogan submits that the police procedure is prima facie unconstitutional because it allows the MBTA to investigate itself. Any "*law that makes a man a judge in his own cause...is a flagrant abuse of legislative* power", according to Justice Chase writing in Calder v. Bull, 3 U.S. (3 Dall) 386 (1798). Bonham's Case, 8 Co 114a, 118a, 77 Eng. Rep. 646, 652 (1610) is the leading authority for the principle.

The policy empowering T patrol officers to referee accidents and punish participants when T vehicles are involved violates clear rulings of the Supreme Court disallowing decision makers with conflict arising from their employer's financial interest. Ward v. Monroeville, 409 U.S. 57, 93 Sup. Ct. 80, 34 L. Ed.267 (1972); Tumey v. Ohio, 273 U.S. 510, 532

Although ostensibly an amendment to Chapter 90C, Chapter 517 of the Acts of 1981 was functionally an amendment of Chapter 664 of the Acts of 1968. 517 changed the entire character of the MBTA patrol force. The amendment of Chapter 664, by Chapter 517 falls clearly within Justice Chase's prohibition. Chapter 517 was enacted to empower the MBTA to accomplish precisely the deprivation that Rogan suffered. The history of the legislation reveals its sinister purpose. To elucidate the rationale of the police policy Commissioner Evans explains that the BPD policy is based on Section 29 of chapter 90, M.G.L., supplemented by Chapter 664. He asserts that Section 29 of Chapter 90 M.G.L. places responsibility for the investigation and processing of accidents on the "*police department or the Chief officer of the police department supervising the accident investigation if two departments have concurrent jurisdiction*".

Evans claims that Chapter 664 created the MBTA patrol force as a "fully qualified police organization" having, "*within the territorial limits of the authority, the* powers and duties which are conferred or imposed upon police officers of *cities and towns under the provisions of Section ninety-eight of Chapter Forty-three of the General Laws.*

Since Rogan's accident occurred on a crossover, (a public way) across the T's reservation, the Commissioner contends that both the City of Boston police and the MBTA patrol force had 'concurrent jurisdiction'. Evans argues that the words "concurrent jurisdiction" indicate a legislative intention contemplating transfers of jurisdiction from Boston to the MBTA. But there is no language in Chapter 90 that mandates or even recommends, the transfer of jurisdiction, or investigation of accidents from one police department to another, and specifically, from the Boston police to the MBTA patrol force. There is no mention whatsoever of Boston police or the Boston Police Department (BPD) in chapter 664. The policy providing for the automatic transfer of jurisdiction was sponsored by Evans **while acting within the sphere of his official duties.** His contention is that the transfer policy is justified as a reasonable strategy for efficient law enforcement.

Evans states that neither he nor his police officers can be blamed for Rogan's deprivation because they had no actual notice that the MBTA patrol force might not investigate the accident with integrity or engage in a cover-up of the trolley operator's negligence.

Monell is authority that notice is not a necessary element where the deprivation is the result of a municipal policy. In any event Evans had 'constructive' notice that T patrol officers might engage in a 'cover-up' of the negligence of the trolley operator. The lower court inferred as much when it denied qualified immunity to the police officers. City of Canton v. Harris, 489 U.S. 378 (1989)

The crux of the city's liability is the existence of the policy. How the policy was imagined or invented whether due to collogue or indifference to the rights of motorists is material on the Commissioner's individual responsibility. The existence of the policy is the crux of the city's liability. The bedrock issue of the litigation is the status of the municipal transfer policy; whether constitutional, *"on its face"* as an *"organizational scheme that lodge(s) self-investigative powers within a government agency"* according to the Court of Appeals, (75 F 3rd @ 78), or unconstitutional because it provides for the automatic transfer of investigative authority to an agency with unquestionable conflict of interest.

The Court of Appeals cited Withrow v. Larkin, 421 U.S. 35,52 (1975) as authority for viability of the policy. Withrow involved an appeal of an abortionist from an administrative (medical) board. Suspension was by physicians who had investigated the doctor. There was no question of 'financial interest' on the part of the decision-makers. Had there been, the court specifically held that its decision would be contrary, citing Ward v. Monroeville, 409 U.S. 57. Gibson v. Berryhill, 411 U.S. 579, 93 S. Ct 1689

Transfers in the instant situation went from the police power of a municipality to a quasi-governmental transit agency operating as a business corporation sensitive to the bottom line, the interests of the public and the pressures of organized labor. In reaching its opinion that the police procedure *"on its face was undoubtedly constitutional"*, the Court of Appeals based its decision on the 'fabrication' that the MBTA patrol force was 'created' by the Act of July 18, 1968, Ch. 664, 1968 Mass. Acts 547 (Appendix D) **"with powers equivalent to those of municipal police officers".** Assuming that premise the court condescended to ignore Chapter 517. Although often reiterated by both police and the judiciary, the fact is that the MBTA patrol force was not created with powers equivalent to those possessed by regular police officers. The T patrol force was formed "to combat vandalism' on T carriers" (R. P. 664,) with considerable restriction on its powers.

For example, it was not to engage in "administrative activities" of the Authority with respect to other T employees, meaning it was not to evaluate employee negligence; that responsibility remained with the T Department of Safety. Secondly, and most importantly, T patrol officers were kept off the streets; they were not given authority under Chapter 90C Mass. G.L. to cite motorists for traffic violations. So the situation remained for about ten years, until the decision in Commonwealth v. Mottola, 10 Mass. App. Ct. 775 interpreting Chapter 664 and holding that patrol officers properly arrested a person off the T premises for harassing a passenger. Encouraged by the decision, the T Board of Directors moved (according to the its 1980 Annual Report) for authority to allow T patrol officers to cite motorists for traffic violations under Chapter 90C m.g.l. The same annual report deplored the budgetary burden due to the rash of claims and large jury verdicts. Chapter 517 of the Acts of 1981 (App E) was lobbied through the legislature amending Chapter 90C Mass. G.L. allowing the T patrol, (along with several other police organizations), to cite motorists for traffic violations. No public hearings were had on the legislation, (House Bill No. 4294, 1981) and apparently no debate. (A-96-97)

Chapter 517 gave the MBTA precisely the leverage it exercised following Rogan's accident. A participant in a traffic accident involving the MBTA was cited to introduce the factor of contributory negligence. A foolproof method to diminish damages under comparative negligence jurisprudence.

It is clear that Chapter 517 was enacted without consideration of the implications of permitting patrol officers to referee motor vehicle accidents involving T vehicles. Chapter 90C as so amended, effectively grants immunity to trolley drivers from civil and criminal prosecution for traffic violations. Trolleys are not 'motor vehicles' and their operators are thereby not covered by Chapter 90C. T patrol officers do not enforce Boston Ordinances regarding the speeds of streetcars. So trolley operators are exempted as a practical matter from any government regulation in the operation of their trolleys.

Hence uniformed T patrol officers approach motor car-trolley accidents without apparent or real parity in respect to their power to cite and punish accident participants. Accordingly the statute denies citizens "*the equal protection of its laws*" guaranteed by the Fourteenth Amendment.

Besides the psychological burden levied on the accident participant, one must report to the MBTA police department to have one's accident report processed. The T patrolman's conflict of interest stems from the peer pressure of fellow employees and union members and most importantly from the financial interest of the T. In situations with the potential for considerable damages, as in the instant situation, not only is the risk of bias great, but the perception of the likelihood of bias is intimidating.

The standard for judging the constitutionality of Chapter 517 requires a balancing of the interest of the state in efficient law enforcement against the individuals' right to an unbiased examination of the facts of one's automobile mishap. The state also has an interest in preserving the citizen from the intimidation T processing can engender. Did the policy not provide for the automatic transfer of jurisdiction, conceivably it could be viable were adequate safeguards provided to protect the private motorist from the risk of bias by T examiners.

In practice and as a result of interpretation by both police departments, the combined effect of Chapter 664 of the Acts of 1968, Chapter 517 of the Acts of 1981 and Chapter 90C m.g.l results in the automatic transfer of jurisdiction whenever a T vehicle is involved in accidents on the public ways.

Since no provision in Chapter 517 of the Acts of 1981 prohibits that practice or interpretation of the law, the same must be held a violation of the Due Process clause of the 14th Amendment. The law discriminates between participants to accidents involving private citizens and those operating MBTA vehicles.

CONCLUSION

The Boston Police Policy sponsored by Commissioner Evans discriminates against motorists involved in accidents with T vehicles, especially trolleys. Chapter 517 of the Acts of 1981 (Mass) must be considered in tandem with Chapters 664 of the Acts of 1968 and Chapter 90C. The effect of the statutes in combination discriminates against motorists involved in incidents with T vehicles.

The history of the legislation discloses that the purpose of Chapter 517 of the Acts of 1981 was apparently to provide the MBTA with a mechanism to unfairly and unethically leverage accident claims. The law results in self examination by the MBTA of negligence by its employees in incidents in which the T may have a considerable financial interest.

There were sufficient allegations in the Complaint to warrant discovery of the role Commissioner Evans played in implementing the police policy.

Respectfully submitted, for the Petitioner,

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 98-1531

SHANNON ROGAN
Plaintiff-Appellant,

v.

THOMAS MENINO, ETC., ET AL.
Defendants, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
(Hon. William G. Young, U.S. District Judge)

before

Torruella, Chief Judge
Selya and Lynch, Circuit Judges

John J. Cloherty, III and Eve A. Piemonte Stacey, Assistant Corporation Counsel, City of Boston, with whom Merita A. Hopkins, Corporation Counsel, was on brief, for appellees.

April 29, 1999

SELYA, Circuit Judge. This appeal stems from a traffic accident that occurred in Boston, Massachusetts. It illustrates once again the dangers that lurk when busy trial courts, struggling to manage crowded dockets, do not turn square corners. The tale follows.

On March 15, 1996, a motor vehicle operated by plaintiff-appellant Shannon Rogan collided with a trolley car operated under the auspices of the Massachusetts Bay Transportation Authority (the MBTA). The MBTA has its own police force, see Act of July 18, 1968, ch. 664, 1968 Mass. Acts 547 (creating a separate police force to function within the MBTA's territorial authority and investing its officers with powers equivalent to those of municipal police officers). And that complement shares jurisdiction over certain matters with the Boston Police Department (the BPD). In this instance, officers from both entities converged on the accident scene. Pursuant to departmental policy, the BPD officers, John McDonough and Robert Colburn relinquished control of the investigation to their MBTA counterparts.

Displeased with the results of the investigation, Rogan sued Thomas Menino (Mayor of Boston), Paul Evans (Boston's police commissioner), Dennis DiMarzio (Boston's chief of operations), and the two responding officers in federal district court.[1] Her complaint limned a plethora of claims – but Rogan voluntarily discontinued most of them, and only one remnant is relevant here. Invoking 42 U.S.C. # 1983, Rogan asserted that the five City of Boston/BPD defendants, jointly and severally, hindered her access to the courts vis-à-vis her accident-related claim for personal injuries and property damage.

---

1. Rogan's complaint also named as defendants the MBTA and several MBTA employees. Her claims against these defendants have been dismissed by stipulation (apparently in connection with a negotiated settlement) and we make no further mention of them.

The defendants were liable, Rogan theorized, because by abdicating responsibility for investigation of the accident they had aided and abetted the MBTA's attempts to cover up the trolley driver's negligence. McDonough's and Colburn's supposed liability rested on their refusal to take control of the investigation. Whereas the other defendants' supposed liability related to their roles in promulgating and enforcing a policy of relinquishing jurisdiction over accidents involving MBTA carriers to MBTA police.

The district court disposed of these claims in two stages. First, acting on the defendants' motion, see Fed. R. Civ. P 12 (b)(6), it dismissed all claims against Menino, Evans and DiMarzio in their individual capacities.[2] Nearly a year later, at the final pretrial conference, the court, acting on its own initiative, brought closure to the suit by entering summary judgment in favor of Evans and DiMarzio in their official capacities and in favor of McDonough and Colburn. Rogan now appeals both the dismissal of her individual-capacity claims against Evans and DiMarzio and the subsequent entry of a sua sponte summary judgment. We address each aspect of her appeal in turn

II

It is axiomatic that the liability of persons sued in their individual capacities under section 1983 must be gauged in terms of their own actions. See Malley v. Briggs, 475 U.S. 335, 341 (1986); Camilo-Robles v. Zapata, F3d (1st Cir. 1999) (Camilio-Robles II) (No 98-1590, slip op. At 7).

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[2] Rogan subsequently amended her complaint and dropped her official-capacity claims against Mayor Menino. She does not now contest the district court's dismissal of her individual-capacity claims against the Mayor, and we have no occasion to consider this ruling

In dismissing the claims against Evans and DiMarzio in their individual capacities, the district court concluded that the complaint utterly failed to link either defendant to the alleged conspiracy to deprive Rogan of meaningful access to the courts. We review this decision de novo, scrutinizing the complaint in the light most favorable to the plaintiff. See Aulson v. Blanchard, ;83 F. 3d 1, 3 (1st. Cir. 1996). In that process, we – like the nisi prius court – must give credence to all well-pleaded facts and indulge all reasonable inferences that fit the plaintiff's stated theory of liability. See id. We stop short, however, of "swallow(ing) the plaintiff's invective hook, line, and sinker; bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like need not be credited." Id. (citing, inter alia, Correa-Martinez v. Arrillaqa-Belendez, 903 F. 2d 49, 52 (1st Cir. 1990)). If, on that basis, the factual averments do not justify recovery on some theory adumbrated in the complaint, then- and only then- can we affirm a dismissal for failure to state an actionable claim. See Leatherman v. Tarrant County N.I. & C. Unit, 507 U.S. 163, 164 (1993).

We agree with the district court, that the instant complaint encompasses no set of facts that entitles Rogan to relief against either Evans or DiMarzio, individually. Charitably construed, the complaint predicates liability on the theory that BPD personnel collogued with MBTA personnel to conceal the negligence of the trolley car driver, thus inhibiting Rogan's right to sue the MBTA for damages. Yet, the complaint does not allege (or even insinuate) that either Evans or DiMarzio directly participated in the actions that purportedly violated Rogan's rights. Rather, the complaint suggests some sort of supervisory liability. To state a cognizable claim on that basis, Rogan needed to depict a scenario that would permit a fact-based

inference that Evans and DiMarzio were guilty of "conduct that amount(ed) to condonation or tacit authorization" of wrongdoing. Camilo-Robles II ___F 3d at ___ (collecting cases) (slip op. At 5); see also (Camilllo-Robles v. Hoyos 151 Fed 3d 1,7 (1st Cir. 1998)) (explaining that supervisory liability requires proof of an affirmative link sufficient to show causation). To a significant extent, the existence of such conduct depends on the presence or absence of notice. See Camilo-Robles II, _____F 3d at 7_____ (slip op. At 12)' Camilo-Robles I, 151 F 3d at 7. Rogan, however, alleges no facts from which a rational reader might infer that Evans or DiMarzio knew (or had any basis for knowing) that MBTA police officers were skewing investigations to minimize MBTA liability.

On appeal, Rogan attempts to confess and avoid. She admits the lack of any averments suggesting notice, but asks us to infer from Evans's and DiMarzio's awareness of the transfer policy a corresponding awareness of the allegedly unconstitutional execution of that policy. The inference is much too strained. The BPD's policy of ceding jurisdiction to the MBTA is undoubtedly constitutional on its face-after all, there is no constitutional prohibition against organizational schemes that lodge self-investigative powers within a government agency. Cf. Withrow v. La;rkin, 421 U.S. 35, 52 (1975) (rejecting the proposition that "agency members who participate in an investigation are disqualified from adjudicating")- and mere knowledge of the transfer policy's existence therefore cannot serve as a proxy for notice of its unconstitutional implementation. We have said enough on this score. Since Rogan failed to plead any facts sufficient to support an inference that Evans and DiMarzio had notice that MBTA police officers were wielding investigative powers in a way that threatened to deprive accident victims of their civil

rights, she failed to state a claim for deliberate indifference against these defendants individually. See Gooley v. Mobil Oil Corp., 851 F. 2d 513, 515 (1st Cir. 1988) (explaining that, to survive a motion to dismiss under Rule 12(b)(6), a complaint must "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery"). Consequently, we affirm the district court's dismissal of the individual-capacity claims against Evans and DiMarzio.

III

When it jettisoned the claims brought against Evans and DiMarzio in their individual capacities, the district court kept alive Rogan's official-capacity claims against these same defendants, treating those as claims against the City of Boston. See Brandon v. Holt, 469 U.S. 464, 471-72 (1985). The court also refused to dismiss the claims against McDonough and Colburn, reasoning that the complaint could be read to allege that they knew MBTA officers would not investigate the accident impartially.

At the final pretrial conference, see Fed. R. Civ. P. 16, the court demanded that Rogan marshal all the evidence at her disposal to defeat summary judgment. She attempted to comply with this directive, but the court found her proffer inadequate. Declaring that no reasonable jury could find for Rogan on the adduced evidence, the court, acting sua sponte, entered summary judgment in the defendants' favor on all remaining claims. Rogan assigns error.

It is apodictic that trial courts have the power to grant summary judgment sua sponte. See Berkovitz v. HBO Inc. 89 F. 3d 24, 29 (1st Cir. 1996). Withal, that power is not unbridled.

To protect against erosion of the fairness principles embedded in Fed. R. Civ. P. 56, a court tempted to grant an unbesought summary judgment must hew to Rule 56's procedural strictures. See Stella v. Town of Tewksbury, 4 F. 3d 53, 56 (1st Cir. 1993). Thus, before the court can seriously consider sua sponte summary judgment, two conditions precedent must be satisfied: (1) the case must be sufficiently advanced in terms of pretrial discovery for the summary judgment target to know what evidence likely can be mustered, and (2) the target must have received appropriate notice. See Leyva v. On the Beach, Inc _____ F 3rd ___ (1st Cir. 1999) (No. 98-111984, slip op. At 51); Berkovitz, 89 F. 3rd at 29; Stella, 4 F3d at 55. Notice in this context, has two aspects: the summary judgment target is entitled to know both the grounds that the district court will consider and the point at which her obligation to bring forth evidence supporting the elements of her claim accrues. See Berkowitz, 89 F 3d at 31.

Inasmuch as the lower court made its sua sponte ruling at the final pretrial conference with discovery complete (or nearly so), the first condition precedent clearly was satisfied here. It is more problematic whether the court fulfilled the second condition

On one hand, the docket sheet reflects that no outstanding motion to dismiss or motion for summary judgment was extant when the court acted: the transcript of the penultimate pretrial conference intimates no warning of the court's intention to consider terminating the case at the final pretrial conference; nothing in the

procedural order entered by the court preliminary to the final pretrial conference directed the parties to prepare for a hearing on dispositive motions; and there is no other record of a written notice that dispositive motions would be entertained at that conference. On the other hand, the defendants have proffered a statement, signed by the district judge pursuant to Fed. R. App. P. 10 c, which indicates that the court had in fact notified the parties during an unreported chambers conference (presumably held in connection with the penultimate pretrial conference) that "pursuant to Fed. R. Civ. P. 16, (it might) dismiss any or all of the defendants; at the final pretrial conference. Moreover, the defendants submitted several affidavits on the day before the final pretrial conference, presumably in anticipation that the court would consider terminating the case then and there.

This Rule 10 c statement arrives on our doorstep in a peculiar manner. In haec verba, Rule 10c permits only an appellant, not an appellee, to prepare a statement summarizing what transpired at an unreported proceeding.3 Here the appellees

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3 The rule states: If the transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court clerk for settlement and approval. As settled and approved, that statement must be included by the district clerk in the record on appeal. Fed. R. App. P. 1- c

prepared the statement, served it on the appellant, and convinced the district court, over the appellant's objection, to approve it. On that basis, the statement's legitimacy might well have been open to question had Rogan asked this court, by motion or in her appellate brief, to strike it. Because Rogan has not mounted such a protest in this venue, we treat any doubts about the statement's provenance as waived, and we leave for another day the intriguing question whether Rule 10 c's reference to "the appellant" must be construed literally. Apart from this procedural obstacle, the statement commands our respect. If Rule 10 c is to be more than a hollow promise, a court of appeals must accept a district court's reconstruction of what transpired at an unrecorded conference or similar proceeding unless some basis exists for believing that the trial court's account is patently unreasonable or deliberately false. See United States v. Keskey, 863 F 2d 474, 478 (7th Cir. 1989) (applying this standard in the Fed. R. App. P. 10(e) context). Rogan makes no plausible accusation of unreasonableness or falsification, and the record reveals no basis for such a charge.

Even so, the mere announcement that the court might dismiss the defendants at the final pretrial conference falls well short of the specific notice to which parties are entitled under Fed. R. Civ. P. 56. In the first place, Rule 56 obliges the moving party to inform the nonmovant of the grounds for the motion by "identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 'which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U. S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56 c). As far as the record in this case reveals, Rogan never received specific advance warning of this kind from either the defendants or the court.

In the second place, once the movant articulates his rationale for brevis disposition and submits the documentation (if any) on which he relies, Rule 56 c in terms entitles the summary judgment target to no less than ten days within which to prepare a defense to the motion. This requirement persists even when the trial court aspires to grant summary judgment on its own initiative. See Stella, 4 F 3d at 56; see also ll James Wm Moore et al. Moores's Federal Practice Sec 56.10(2)(b). Here however, the defendants filed several affidavits on the day before the final pretrial conference, and the court considered them without affording Rogan the benefit of the ten-day window that Rule 56 envisions. In doing so, the court erred. Accord Massey v. Congress Life Ins. Co, 116 F 3d 1414-18 (11th Cir. 1997) (reversing sua sponte summary judgment for failure to comply with Rule 56's ten-day notice requirement).

That the district court acted under the auspices of Fed. R. Civ. P. 16 provides no cover. To be sure, Rule 16 permits a court to dispose of marginal claims or issues that do not warrant a full-dress trial. See Fed. R. Civ. P. 16 (c)c (1) (authorizing district courts to "take appropriate action, with respect to...the elimination of frivolous claims or defenses" at pretrial conferences). Nevertheless, when the district court employs summary judgment as the vehicle for the elimination of such detritus, Rule 16 does not trump the procedural prophylaxis of Rule 56. See Stella, 4 F 3d at 56. Without advance notice of the basis of a looming dismissal, a targeted party lacks a "meaningful opportunity to cull the best evidence, together with developed legal argumentation, in opposition to the entry of summary judgment." Berkovitz, 89 F 3d at 31. And where, as here, the summary judgment loser was never afforded such an opportunity, sua sponte summary judgment cannot stand.[4] See id. At 29 (holding that the trial court must provide a targeted party with an "adequate opportunity to dodge the bullet" before entering sua sponte summary judgment).

We need go no further. The district court properly dismissed the claims that Rogan brought against Evans and DiMarzio, individually, and to that extent we affirm the judgment below. However, despite our repeated calls for caution in the use of sua sponte summary judgments, see e.g. Layva, ____F 3d at _____ (slip op. At 4) Jardines Bacata, Ltd v. Diaz-Marquez, 8798 F2d 1555, 1560-61 (1st Cir. 1989) the court below acted too hastily in dispatchng the other claims in this case. Thus, we vacate the remainder of the judgment and remand for further proceedings in the district court.[5] We take no view of the merit (or lack of merit of Rogan's case. **Affirmed in part, vacated in and remanded. All parties to bear their own costs.**

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[4] The appellees insist that, whatever procedural irregularities may have occurred, we should sustain the judgment because Rogan lacks the ammunition necessary to deflect summary judgment. That assessment may be true – but it is beside the point at this juncture. The issue here is one of process and fundemental fairness, not one of substance. See Leyva F3d at ____ (slip op. At 7)

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[5] We anticipate that the court, among other things, will address Rogan's motion to compel further answers to interrogatories (which it denid as moot after it had granted summary judgment sua sponte).5.

APPENDIX A

Chap. 517. AN ACT PROVIDING THAT PROCEDURE AGAINST CERTAIN VIOLATORS OF MOTOR VEHICLE LAWS BE EXTENDED TO INCLUDE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY POLICE DEPARTMENT

Be it enacted, etc., as follows:;

Section 1 of chapter 90C of the General Laws is hereby amended by striking out the definition "Police Chief", as most recently amended by section 1 of chapter 222 of the acts of 1967, and inserting in place thereof the following definition:-

-"Police Chief", the chief or the head of the organized police department of a city or town, the commissioner of public safety, the superintendent of the metropolitan district commission police, the registrar of motor vehicles, the state superintendent of buildings, the chairman of the Massachusetts Turnpike Authority, such person as the trustees of the University of Massachusetts shall appoint as chief of the police officers appointed under section thirty-two A of chapter seventy-five, such persons as the commissioner of mental health may designate at each institution of the department of mental health as chief of the special police officers thereat appointed under section ten B of chapter one hundred and forty-seven or the chief of the Massachusetts Bay Transportation Authority police department.

Approved November 5, 1981

APPENDIX B Chapter 664 of the Acts of 1968 (Mass.)

Chap. 664. An Act PROVIDING FOR THE ESTABLISHMENT OF A POLICE DEPARTMENT BY THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

Be it enacted, etc, as follows:

Section 1:There shall be established by the Massachusetts Bay Transportation Authority, hereinafter called the authority, a police department to be under the supervision of a police officer to be known as the chief of police. Said office of the chief of police and offices and positions in said police department shall be subject to the provisions of chapter thirty-one of the General laws. Such police officers shall have, within the territorial limits of the authority, the powers and duties which are conferred or imposed upon police officers of cities and towns under the provisions of section ninety-eight of chapter forty-one of the General Laws, and shall have the powers and duties which are conferred or imposed upon police officers under section ninety-three of chapter one hundred and fifty-nine of the general laws to the same extent as though they had been appointed on petition of the authority pursuant to the provision of section nine L of chapter twenty-two of the General laws, and the provisions of said section ninety-eight, as amended, and of said section ninety-three, as amended shall apply to such police officers in the exercise of the aforesaid powers and duties.

Such police officers shall not engage in the administrative activities of the authority with reference to other employees of the authority except as required in the exercise of their powers and duties as police officers and in the protection of persons and property.

SECTION 2 The chief of police of the authority or, in the absence of the chief of police, a person designated by the board of directors of the authority to act in his stead may, upon the requisition of the mayor or chief of police of selectmen of a city or town or person however designated having the duties of chief of police, or, in the absence of the chief of police or of such person, the commanding officer, provide police officers who shall have the authority of constables and police officers within the limits of such city or town, except as to the service of civil process, and, while exercising such authority within such limits, shall have the same immunities and privileges as when acting within the limits of the authority; and the authority shall be entitled to receive from such city or town the amount paid to them for their services including their necessary traveling expenses. The mayor, selectmen or chief of police of a city or town or person however designated having the duties of chief of police, or, in the absence of the chief of police or of such person, the commanding officer, may, upon requisition of the board of directors of the authority or chief of police of the authority or, in the absence of the chief of police, a person designated by the board of directors to act in his stead, provide police officers who shall have the authority of constables and police officers within the limits of the authority, except as to the service of civil process, and while exercising such authority within the limits of the authority, shall have the same immunities and privileges as when acting within their respective cities and town; and the city or town providing such officers shall be entitled to receive from the authority the amount paid to them for their services including their necessary traveling expenses.

SECTION 3. A person arrested by a police officer ofthe authority shall be taken to a police station or other place of lawful detention within twenty-four hours after the time of such arrest, Sunday excepted, in the city or town where the arrest is made or where the car, vehicle, bus or train next stops or in any city or town of the same or adjoining county through which the car, vehicle, bus or train passes after the arrest. Complaint shall be made by the arresting officer against the person arrested for the offense for which he was arrested to a district court and such court shall have jurisdiction of the case.

APPENDIX C

Judgment, Order of the District Court 4/27/98

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
Civil Action
No. 97-10417-WGY

SHANNON ROGAN
Plaintiff
v.

HON. THOMAS MENINO individually and as Mayor of the City of Boston; DENNIS A. DIMARZIO, Individually and as Chief Operating Officer of the City of Boston; PAUL F. EVANS, Individually and as police Commissioner of the City of Boston; ROBERT COLBURN, Individually and as a police officer of the City of Boston; JOHN McDONOUGH Individually and as a police officer of the City of Boston; JAMES McDONOUGH, Individually and as Assistant General Counsel to the MBTA; PETER ROY, DAVID ALBANESE and STEVEN SALISBURY, patrol officers of the MBTA; and THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Defendants.
AND

Civil Action No 97-12245-WGY

SHERMAN ROGAN
Plaintiff
v.

PAUL F. EVANS, Individually and as Police Commissioner of the City of Boston; ROBERT COLBURN, Individually and as a police officer of the City of Boston; JAMES McDONOUGH, Individually and as Assistant General Counsel to the MBTA DAVID ALBANESE and STEVEN SALISBURY, patrol officers of the MBTA; JOHN MARTINO, Individually and as Deputy Chief of the MBTA Police Force and the MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.
Defendants.

Civil Action No 97-10417-WGY
Judgment is hereby entered in favor of the following defendants because the actions against them have been dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief can be granted:
HON. THOMAS MENINO[1]
DENNIS A. DIMARZIO in his individual capacity
PAUL F. EVANS in his individual capacity[2]
JAMES McDONOUGH, PETER ROY, DAVID ALBANESE, STEVEN SALISBURY, JOHN ANTHONY MARTINO

Judgement is hereby entered in favor of the following defendants pursuant to the Court'' determination at the Final Pretrial Conference that summary disposition is appropriate under Fed. R. Civ. P. 56 because there is no genuine issue of material fact to be tried:
DENNIS A. DIMARZIO in his official capacity
PAUL F. EVANS In his official capacity
ROBERT COLBURN, JOHN McDONOUGH AND the MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

(S) Tony Anastas Clerk
(s) Elizabeth Smith, Deputy Clerk
April 27, 1998 Form of judgment approved. (s) William G. Young District Judge.

1Shannon Rogan amended her complaint to dismiss all claims against the Mayor, See Docket N 27

2. The action against Paul F. Evans in his individual capacity was to have been dismissed pursuant to the Court's order of May 8, 1997. Docket entry #25 erroneously substituted John McDonough, who was not dismissed. See Docket #30

APPENDIX D

JUDGMENT, Court of Appeals 4/29/99

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT
No 98-1531
SHANNON ROGAN, ET AL.
Plaintiffs-Appellees.
v. THOMAS M. MENINO, ETC. ET AL
Defendants-Appellees.

JUDGMENT
Entered: April 29, 1999

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, vacated in part, and remanded to the district court for further proceedings in accordance with the opinion filed this day.

All parties to bear their own costs.

By the Court

Phoebe Morse, Clerk (cc. Messrs. Rogan and Cloherty)

APPENDIX F

Motion For Reconsideration Denied 7/27/99

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT No. 98-1531
SHANNON ROGAN, ET AL.
Plaintiff-Appellants,
v.THOMAS MENINO, ET ALS.
Defendants-Appellees.
Before
TORRUELLA, CHIEF JUDGE,
SELYA AND LYNCH, Circuit Judges.
ORDER OF COURT
Entered: July 27, 1999
Upon consideration of :
Motion for Reconsideration,
It is hereby ordered that said motion be, and the same hereby is, denied.
By the Court:
Phoebe D. Morse, Clerk
By: Janice M. O'Neil
Chief Deputy Clerk

APPENDIX G. Boston Ordinances

ORDINANCES, City of Boston Code, Ordinances Title 16 section 16.16.1 Speed Limits
16-16-2
In approaching any public or private way intersecting that in which the railway is located, the speed of the car must be reduced to such a rate as will make it possible to stop immediately. (CBC 11975 Ord. T14 Sec 326)

(2)

No. 99-646

Supreme Court, U.S.
FILED
NOV 12 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SHANNON ROGAN,

Petitioner,

v.

PAUL F. EVANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

1488

QUESTION PRESENTED FOR REVIEW

Whether the First Circuit Court of Appeals properly affirmed the dismissal of Respondent, Paul Evans, in his individual capacity, when Petitioner failed to plead facts sufficient to support an inference that Respondent had notice of or directly participated in an alleged conspiracy between the Boston Police Department and the MBTA police.

LIST OF PARTIES

The Respondent, Paul Evans, does not concede responsibility for a policy providing for the automatic transfer of jurisdiction when an accident occurs on public ways.

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Supreme Court Rule 10 3

No. 99-646

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

SHANNON ROGAN,

Petitioner,

v.

PAUL F. EVANS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the First Circuit is reported at 175 F.3d 75 (1st Cir. 1999). The Opinion of the United States District Court for the District of Massachusetts is unreported. Both decisions are reproduced in the Appendices to the Petition (A-la-11a, A-16a-18a), respectively.

BASIS OF JURISDICTION

The Petitioner has invoked the jurisdiction of this Court under 28 U.S.C. § 1254. Respondent is satisfied with this statement of jurisdiction insofar as it challenges dismissal of Evans in his individual capacity.

STATEMENT OF CASE

Respondent is not satisfied with the Statement of the Case presented in the Petition as it contains misstatements of the record below, and her own conclusions of law. Respondent submits the following Statement of the Case, taken from the opinion issued by the First Circuit Court of Appeals ("First Circuit"):

On March 15, 1996, a motor vehicle being operated by Petitioner Shannon Rogan collided with a trolley car operated by the Massachusetts Bay Transportation Authority ("MBTA"). The MBTA has its own police force, and shares jurisdiction with the BPD over certain matters. Officers from both the MBTA and the Boston Police Department ("BPD") responded to the accident scene. Pursuant to departmental policy, the BPD officers that initially responded to Petitioner's motor vehicle accident turned over control of the investigation of the accident to the MBTA officers. *Rogan* v. *Menino*, 175 F.3d 75, 76 (1st Cir. 1999).

Petitioner sued Respondent Paul Evans in the United States District Court for the District of Massachusetts ("District Court"). Invoking 42 U.S.C. § 1983, Rogan alleged that Respondent Evans, jointly and severally with the other Boston defendants, hindered her access to the courts by turning over control of the accident investigation, thereby

conspiring with the MBTA in an attempt to cover up the negligence of the MBTA trolley driver. *Rogan* v. *Menino*, 175 F.3d at 77-78.

The District Court dismissed all claims against Respondent in his individual capacity on respondent's motion to dismiss. (A-16a-18a). Respondent was then dismissed in his official capacity at final pretrial conference, and summary judgment entered in favor of Respondent Evans. *Id.* The First Circuit found that the District Court properly dismissed the claims against Evans in his individual capacity, and affirmed that portion of the District Court's decision. *Rogan* v. *Menino*, 175 F.3d at 81. The remainder of the judgment was remanded for further proceedings in the District Court. *Id.*

REASONS FOR DENYING THE WRIT

Pursuant to Supreme Court Rule 10 "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion . . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." In this case, the Respondent improperly states the proceedings and holdings below, and asks this Court to find error in both the District Court and First Circuit's dismissal of Respondent Evans in his individual capacity, when to do so was proper. The District Court and the First Circuit Court of Appeals properly concluded that Respondent Evans should be dismissed in his individual capacity.

Both the District Court and the First Circuit properly reviewed Petitioner's claims against Respondent Evans when ruling on Respondent's motion to dismiss. The First Circuit accepted Petitioner's well-pleaded facts as true, and drew all reasonable inferences in Petitioner's favor. *Rogan* v. *Menino*, 175 F.3d 75, 77 (1st Cir. 1999); *Aulson* v. *Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Stating that liability in an individual capacity under section 1983 "must be gauged in terms of [his] own actions", Respondent Evans was dismissed. *Rogan v. Menino*, 175 F.3d at 77. Both the District Court's and the First Circuit's dismissal of Evans was proper, based on properly stated rules of law.

The Petitioner's bold, unsubstantiated argument that the First Circuit, and by inference the District Court, "invented a theory of liability" is in no way justified by the record, and is simply incorrect. In a well-reasoned, thorough decision, the First Circuit analyzed the dismissal of Respondent Evans *de novo,* and arrived at the same result as the District Court. *See Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). Petitioner failed to state a claim of deliberate indifference against Evans, individually. Petitioner also failed to allege that Evans directly participated in the actions that allegedly violated her rights. Therefore, whichever theory of liability that Petitioner chooses, she has failed in all regards, as both lower courts have found, and she cannot now look to this Court to support her unsubstantiated, unplead theories against Respondent, Paul Evans.

I. THE LOWER COURTS PROPERLY FOUND THAT THE PETITIONER FAILED TO PLEAD FACTS SUFFICIENT TO SUPPORT AN INFERENCE THAT RESPONDENT PAUL EVANS HAD NOTICE OF OR DIRECTLY PARTICIPATED IN AN ALLEGED CONSPIRACY BETWEEN THE BOSTON POLICE DEPARTMENT AND THE MBTA.

Both the District Court and the First Circuit Court of Appeals properly reviewed Petitioner's allegations against Respondent, Paul Evans, and properly dismissed Respondent Evans in his individual capacity. The First Circuit accepted all of Petitioner's well-pleaded facts as true, and drew all reasonable inferences in Petitioner's favor. *Rogan* v. *Menino*, 175 F.3d 75, 77 (1st Cir. 1999); *Aulson* v. *Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996). Dismissal was affirmed by the First Circuit after accepting all well-pleaded facts, drawing reasonable inferences, and concluding that the factual allegations in Petitioner's Complaint did not justify recovery on Petitioner's conspiracy theory. *Rogan* v. *Menino*, 175 F.3d at 77; *see also Leatherman* v. *Tarrant County N.I.&C. Unit*, 507 U.S. 163, 164 (1993). Properly stating that "liability of persons sued in their individual capacities under section 1983 must be gauged in terms of their own actions," *Rogan* v. *Menino*, 175 F.3d at 77; *see also Kentucky* v. *Graham*, 473 U.S. 159 (1985), the First Circuit and the District Court dismissed Respondent in his individual capacity, concluding that Petitioner's complaint "utterly failed to link [Evans] to the alleged conspiracy to deprive Rogan of meaningful access to the courts." *Id. See also Barreto-Rivera* v. *Medina-Vargas*, 168 F.3d 42 (1st Cir. 1999) (to recover against a supervisor under § 1983, a plaintiff must show that there is an affirmative link between the street-level misconduct and the

action, or inaction, of supervisory officials). The First Circuit did so only after properly construing Petitioner's complaint in the light most favorable to her, and found that, at most, the complaint predicated liability "on the theory that BPD personnel collogued with MBTA personnel to conceal the negligence of the trolley car driver, thus inhibiting Rogan's right to sue the MBTA for damages." *Rogan* v. *Menino*, 175 F.3d at 78. Even with such a finding, the First Circuit properly concluded that Petitioner did not allege, or even insinuate, that Evans directly participated in the actions that allegedly violated Petitioner's constitutional rights. *Id.*

Yet, even construing the Petitioner's complaint in this charitable and liberal fashion, the First Circuit concluded, properly, that without stating or pleading some direct involvement by Respondent Evans, Petitioner was then required to state a claim of supervisory liability against Evans to keep her allegations against Respondent in his individual capacity alive. To do so, Petitioner needed to "depict a scenario that would permit a fact-based inference that [Evans was] guilty of 'conduct that amounted to the condonation or tacit authorization' of wrongdoing." *Rogan* v. *Menino*, 175 F.3d. 75, 78 (1st Cir. 1999); *see also Camilo-Robles* v. *Zapata*, 175 F.3d 41 (1st Cir. 1999); *Barreto-Rivera* v. *Medina-Vargas*, 168 F.3d 42 (1st Cir. 1999). Petitioner failed to allege any facts from which any court could conclude that Evans knew or had any basis of knowing that MBTA officers were improperly investigating MBTA accidents to shield or decrease MBTA liability. Because Petitioner once again failed to do so, dismissal of Respondent Evans was proper.

As she did in the lower courts, Petitioner concedes that Evans had no notice of a conspiracy between the BPD and the MBTA, but requests now that this Court as well make quantum leaps in logic to infer that because there was a policy of transferring investigations of MBTA trolley-car acci-

dents to the MBTA, then there must have been a conspiracy between the two police forces, and that Respondent Evans must have known that the policy was being followed in an unconstitutional fashion. The First Circuit properly found that there is no prohibition against investigations being conducted by a member of the same agency that he or she is investigating. *Withrow* v. *Larkin*, 421 U.S. 35, 52 (1975). To the contrary, courts have long recognized implicitly that police departments in Massachusetts have established internal affairs divisions for the purpose of conducting such investigations of their own officers. *Cf. Commonwealth* v. *Wanis*, 426 Mass. 639, 690 N.E.2d 407 (1998); *Reinstein* v. *Police Commissioner of Boston*, 378 Mass. 281, 391 N.E.2d 881 (1979). And, the Petitioner has failed to overcome the presumption that government officials are impartial. *Withrow* v. *Larkin*, 421 U.S. 35 (1975).

Further, Respondent Evans is yet another step removed from Petitioner's allegations of impartiality, and the Petitioner's bare and unsupported allegations of some sinister MBTA conspiracy. Although Petitioner alleges that, incredibly, the lower courts "invented a theory of liability" to avoid the implications of *Monell*, such is not the case. Interpreting its earlier decision, this Court stated that *Monell* "provides a fault based analysis for imposing liability." *Oklahoma City* v. *Tuttle*, 471 U.S. 808, 818 (1985). "Where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 824.

Assuming Petitioner directs her *Monell* argument against Respondent's official capacity allegations, which are not the basis of this appeal nor raised in her Petition, she has failed once again. The First Circuit properly found that the policy

of transferring investigations to the MBTA was not inherently unconstitutional, stating that the policy "is constitutional on its face — after all, there is no constitutional prohibition against organizational schemes that lodge self-investigative powers within a government agency. . . ." *Rogan* v. *Menino*, 175 F.3d 75, 78 (1st Cir. 1999). Further, Petitioner has presented absolutely no evidence in either the District Court or the First Circuit Court of Appeals of a causal connection between this policy and any alleged constitutional violation. Thus, the dismissal of Respondent Evans in his individual capacity, by both the District Court and the First Circuit Court of Appeals was proper, as Petitioner has failed to establish both an unconstitutional policy and a causal connection between the policy and the alleged constitutional deprivation.

CONCLUSION

For all of the above reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,
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